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No. 98-635

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1998

FRANCES McPHAIL, as Administratrix of the Estate of David Harry McPHAIL, Deceased,

Petitioner,

vs.

MITSUBISHI MOTOR MANUFACTURING OF AMERICA, INC., MITSUBISHI MOTOR SALES OF AMERICA, INC. and VALUE RENT-A-CAR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE FACTS

The Statement of the Facts set out in the original Petition for Certiorari are an accurate statement of the facts applicable to this case.

SUMMARY OF THE ARGUMENT

This brief addresses the Defendants' contention that the sole question justifying consideration by this Court is whether the decisions by the lower Courts directly conflict with specific rulings made by this Court and their contention that they do not. This brief points out numerous ways that this Court's Rule 10 is addressed in our Petition For Writ of Certiorari. Of necessity some of this brief touches on the merits of the case as if this were a Rule 24 Brief.

ARGUMENT

Defendants incorrectly argue that the sole question justifying granting of Certiorari is whether the ruling of the Circuit Court has decided an important question of Federal Law in conflict with relevant decisions of this Court.

Although Petitioner's Application for Certiorari was not intended to be a brief on the merits, it shows that the District and Circuit Court decisions not only conflict with the holding of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), requiring that the substantive law of the states involved be applied, but that there are other compelling reasons for granting certiorari.

There is a clear danger of Courts subject to 11th Circuit's supervision deciding defective product cases applying only Alabama's Manufacturer's Extended Liability Doctrine without considering Bailment, Negligence, Wantonness, or Warranty issues.

There is a clear need to forestall a conflict between the 11th Circuit and the Alabama and Florida Supreme Courts on these important matters of substantive law. *Dawson Chemical Co. v. Rohm and Haas Co.*, 100 S.Ct. 2601, 448 U.S. 176, 65 L.Ed.2d 696 (1980) and *Radiant Burners v. Peoples Gas Light & Coke Company*, 81 S.Ct. 365, 364 U.S. 656, 5 L.Ed.2d 358 (1961), are examples of this Court granting certiorari to forestall conflicts.

The decisions fly in the face of and nullify important aspects of Congressional Legislation which preempt contrary holdings regarding a manufacturer's duty in placing a vehicle in interstate commerce. The Statute makes the manufacturer responsible for designing safer vehicles. The Lower Courts shift this responsibility to injured bailees despite the statute making the manufacturers prove to the Secretary that its vehicles, as designed and manufactured, meet certain tests of roadworthiness.

They impose on persons with limited resources the responsibility to come up with a design which the Secretary would approve even though there are already numerous alternate designs on the road.

The rulings also hold for naught state statutes making the bailor of short term rental items responsible for seeing that his products are merchantable and reasonably safe for their intended use by bailees. *Leavitt v. Jane L.*, 116 S.Ct. 2068, 518 U.S. 137, 135 L.Ed.2d 443 (1996) and *Virginia v. American Booksellers Assoc., Inc.*, 108 S.Ct. 636, 484 U.S. 383, 98 L.Ed.2d 782 are examples of this Court reviewing rulings having the effect of nullifying state statutes.

Another reason for certiorari is that the lower Court decisions nullify important aspects of Rule 26 FRCP, creating an ambiguity by their treatment of rebuttal expert witnesses reports governed by Rule 26(a)(2)(C). There are cases which agree with the 11th Circuit in requiring the plaintiff to preguess any rebuttal which might be required to rebut a yet unfiled report.

There are cases which hold that the plaintiff is entitled to 30 days after defendants' expert reports are filed to reply or rebut. Some of these cases are *Knapp v. State Farm*, 94-2420-EEO (N.D.Ill.1995)and *Fuller v. Volvo G.M. Heavy Truck Corp.*, 92C 1797 (N.D.Ill.1995). Also see *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 168 F.R.D. 161 (S.D.N.Y.1996) and *Dixon v. Certainteed Corp.*, 168 F.R.D. 51 (D.Kan.1996).

There is a third line of reasoning that concludes that reply or rebuttal can only be had with permission of the District Court. *I.B.M. v. Tasco Industries, Inc.*,93-20036 (N.D.Cal.1995).

A fourth line of reasoning is that experts who have previously submitted reports can amend their reports to add rebuttal as being supplementation. *ABB Air Preheater, Inc. v. Regenerative Environmental Equipment Co.*, 167 F.R.D. 668 (D.N.J.1996) Since the District Court struck McEachern's

report on one day and entered Summary Judgment the next day Plaintiff had no opportunity to have Lewter sign the report after the court ruled McEachern ineligible to be a witness.

We are unaware of any other cases requiring a signed report to be sworn to if a Rule 56 Motion is filed, and signing alone seems to be sufficient. *Nguyen v. IBP, Inc.*, 162 F.R.D. 675 (D.Kan.1995); and *Marek v. Moore*, 171 F.R.D. 298 (D.Kan. 1997).

Another reason for granting the writ has to do with the District and Circuit Courts' departure from the usual course of judicial proceedings by deciding fact issues on a Motion For Summary Judgment without consideration of offered proof clearly admissible under Rules 703, 801(d), 803(1), 804(a)(3), and 807 of the Federal Rules of Evidence.

The Courts failed to consider the complaints concerning the car made by the deceased and others prior to the accident. This contributed to their failure to recognize that the evidence clearly showed that the defendants put into the flow of interstate commerce a defective product which failed when put to its reasonably foreseeable use.

The circumstances were such that a jury can reasonably infer that the defendants were aware the vehicle was malfunctioning when they did so.

CONCLUSION

There are numerous reasons for granting the Petition for Certiorari. The effectiveness of Federal and State Statutes designed to protect the public are being seriously compromised by the lower Courts' treatments of this case. Rules of Evidence and Procedure are also being compromised. Old Common Law Doctrines deemed applicable in deciding cases in State Courts are being eliminated when considering factual issues in Federal Courts.

The obligation to decide substantive issues of State Law as the law is declared by the States Courts and Legislature is being ignored. Parties bearing the burden of proof will be deprived of meaningful discovery.

Summary Judgments will be resolved by the courts deciding disputed issues of fact.

The rulings by the lower Courts relating to discovery encourage a return to form over substance, and parties bearing the burden of proof will be denied an opportunity for meaningful reply or rebuttal in future cases.